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ABSTRACT

This paper selectively reviews education law since 1954 and forecasts trends and major issues for the 1980's. Two trends are foreseen: increasing conflict between social goals and individual rights, and greater emphasis on "housekeeping" issues. Five upcoming issues are then examined with reference to recent litigation and legislation (chiefly in West Virginia): personnel management, labor relations, religious activities, testing and academic standards, and school finance. First, treatment of personnel management centers on a case that considered the application of personnel policies with regard to an employee's freedom of expression. Second, two labor relations cases are discussed; one considered federal regulation of state employment practices, the other, rights of nonunion teachers ("City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission"). Third, the author discusses West Virginia legislation on school prayer and regulation of religious schools. Fourth, academic standards issues arising from competency testing and educational malpractice suits are examined. Finally, the paper reviews a 1979 school finance case, "Pauley v. Bailey," in which, pursuant to the Supreme Court's finding that certain disadvantaged students had been denied equal protection, a trial judge promulgated detailed standards for improving West Virginia schools. (MCG)

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THE COURTS AND YOU

By

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Roy Truby

Clinic D-64

As a state school administrator, I appreciate, once again, the opportunity to speak to the managers of our country's local school districts. We have many problems -- too many to face alone. Most importantly we are fellow advocates for children.

The school board members of this country and the school administrators must work closely together at both the state and local level. Serving on a local school board or a state board has never been more complicated or difficult.

I'm going to talk about "court cases" and how they affect you, but first I want to raise some questions and share some thoughts about the need for cooperation among all of us as partners in this management enterprise.

Let's first look at some of the problems or opportunities we face:

1. We need to be skilled fighters for public resources both at the state and local level.
2. We must communicate with school patrons that are more publicized today.
3. We must be able to work in a new area of employer-employee relationships.

4. We must constructively plan for problems rather than just react to decisions of other political bodies, such as courts and the legislature.

I am often told that the courts are taking over education. I would like to review briefly with you some of the involvement by the courts:

It hasn't been too many years ago when I was in junior high that all the black kids from my neighborhood were bused 30 miles to black schools. Of course, we didn't call it "busing" then -- that word was invented when we bused our first white kids. And yet, we stood up every morning to salute the flag and utter the words, "liberty and justice for all." But I'm glad we saluted the flag and recited the Declaration of Independence -- "all men are created equal" -- because somewhere along the line, some of us began to believe it.

And then came Brown v. Board of Education of Topeka, 1954, in which this nation's highest court said, "Separate but equal has no place in public education." Segregation in the public schools was denied as a social policy consistent with the equal protection of the laws as guaranteed by the 14th Amendment. The court held that school authorities have prime responsibilities for initiating action to solve desegregation problems.

One might wonder where this country would be today if one hundred years ago we had decided to educate blacks at the same level as whites. So the courts moved in and dictated policy to us. I think most of us in this country are glad that they did.

About ten years ago, I visited a classroom in Idaho. A small boy with a brown face was staring out the window, and I asked the teacher why he wasn't paying attention. She said that it was hard for him because he didn't understand a word of English. Can you imagine what that would be like -- listening to a foreign language six hours a day? The child probably went home and told his mother that his teacher couldn't talk. Where was the compassion and openness in the words on our Statue of Liberty -- "Give me your tired, your poor, your huddled masses yearning to breathe free"? Didn't we understand that equal opportunity is the very essence of a free society?

Then in 1973 came the Lau decision that again interfered with state and local prerogatives. Mrs. Lau felt that her children had a right to an education in their primary language. She took her appeal all the way to the Supreme Court of the United States. In what other country could this have happened? And Lau centers were established across the country.

I realize that federal regulations that followed with respect

to bilingual education were far too prescriptive, and I'm personally one who believes that any bilingual program must be transitional in nature with the goal to have all children speak English as our primary language. Yet, who would deny the fact that a child needs help at least in the transitional stage? I had one school board member tell me years ago that in America they ought to speak American -- not English, mind you, but American. Another said that English was good enough for Jesus Christ so it ought to be good enough for all of us.

In 1975, we had decisions relating to students rights. Two major decisions -- Goss v. Lopez and Wood v. Strickland -- represented a new and developing chapter concerning personal liability for educators who violate the constitutional rights of students or personnel. In 1973, school authorities found that students Peggy Strickland and Virginia Crain had spiked the punch at a school picnic held by the Mena, Arkansas, public schools. I point out that they spiked this punch with two bottles of "Right Time Malt Liquor," which is the equivalent of two bottles of beer. The two girls were immediately expelled. The court concluded that the girls were denied due process. It went on to say that a school board member is not immune from liability for damages "...if he or she knew or reasonably should have known that the action he took within his official responsibilities would violate the constitutional rights of persons affected,..."

Later in the same year, in the Goss v. Lopez case, the Supreme Court went on to say that the 14th Amendment applied when students were suspended or expelled because the right to a public education is a property right protected by the due process clause of the 14th Amendment. Thus, we now have school board policies across this country providing for short suspensions and long suspensions and expulsions which follow at least rudimentary due process procedures.

But again who would not argue that, in a country where free public education is considered a birthright, we provide minimal due process before the birthright is denied?

In 1971, we had the Serrano v. Priest case, and in 1973, the San Antonio Independent School District v. Rodriguez case charging that the California and Texas school finance systems discriminated against students on the basis of wealth and violated the equal protection guarantee of the state constitutions. I'll have more to say on that issue later, because in 1979, the Pauley v. Bailey decision was rendered in West Virginia, and subsequently the now famous Recht decision was issued on May 11, 1982, with the final order issued in January of 1983. This decision goes further than any court decision in the history of our nation toward defining what is meant by a "thorough and efficient system" of public schools. The question here is whether education is a fundamental right as defined under the various state constitutions. In most

states, such as Texas, California, New York and Idaho, it is said that it is not. West Virginia is one of several states that has said that education is a fundamental right, and, therefore, a whole different set of standards must be applied to determine whether students are receiving equal protection.

The point is, these are major issues in which the courts have gotten involved. Is it really far-fetched to say that education dollars have to follow the students, not the railroad tracks and the power lines? I think not.

But we could go on. What about federal interference and court interference with respect to sex equity? How many of us have grumbled about the Title IX regulations and other requirements that we not discriminate on the basis of sex? Yet in West Virginia and in many other states, for years we spent ten dollars for boys athletics for every dollar we spent on girls. We relegated the job to girls of shaking pom poms and their bottoms as they cheered the boys on to victory. In West Virginia we have fifty-five county superintendents and they're all men and most people really don't see anything wrong with that.

Title IX has also touched our lives in the area of equal employment. We are making progess. We are beginning to get the idea that real talent is too dear to pass up on the basis of race

or sex. We are beginning to understand that women can be competent administrators and men can be sensitive elementary, and even kindergarten, teachers.

It will take a while, but the "good old boys' club" in education is going to break up.

The principal case leading up to Public Law 94-142 was the Pennsylvania Association for Retarded Children v. Pennsylvania, which involved a class action suit by parents. The court found for the parents and children, acknowledging the right of these children to an education and outlined in great detail what the state was obligated to fulfill in this responsibility. It was really based on this -- that this Pennsylvania case of the requirements of P.L. 94-142 came into being. I think that P.L. 94-142 is far more prescriptive than it ought to be. Perhaps this is an example of overkill on the part of federal legislation. But one must remember that P.L. 94-142 came about because we were not meeting the needs of handicapped children.

In the 1980s we had significant federal involvement regarding the mentally and physically handicapped. Few of us would deny that traditionally handicapped persons have been treated as second class citizens, particularly in education where they were kept away from the core of American society. In 1982, a federal court held in New York that a child with minimal residual hearing

who received no assistance in sign language was being denied the opportunity to achieve her full potential commensurate with opportunities provided to other children.

We can go on about the court decisions and the court take-over as some have described it, but think for a minute on the issues that were primary issues in the '70s dealing with due process, civil rights, the rights of handicapped individuals, sex equity, etc.

What kind of issues did we initiate in the courts? In the '60s and '70s, we went to court in more than 2,000 cases (at the cost of millions of dollars) to regulate the length of school boys' hair.

Our challenge is not in the courts but to learn how to work out disputes between teachers and administrators, students and teachers, and school boards and constituencies.

This brings me to the question of political involvement in education. The courts, legislators, governors, local school boards all are part of the American political system of give-and-take which affects education. I hear too many educators say, "Well, that's politics," as if we were above it all. Politics is the very essence of civilization. In our public schools, we

serve families ranging from extreme liberal to ultra-conservative. Without a political system of give-and-take, we would have anarchy.

So many times we, in education, deal with egos rather than ideas. When someone attacks a point that we have made on an issue, we feel they have attacked us. I think political and legal training to a certain extent helps us to get beyond that. We have to learn that in the American political system, through compromise, we generally get a little bit of what we want. We seldom get everything we want. That's why we have a two party system in this country.

The relationship between the courts and the schools seems to be changing, and this makes many school administrators uneasy. But I think we have to remember that the picture isn't all black and white -- it's full of changing lights and shadows. We need to get involved with the legal system. It's more important to learn when to use the courts than how to use them.

The premise of education law

In the study of education law, we must begin with the umbrella concept upon which education and the laws are built in our society. It's important to note that the state is seeking first to develop an educated citizenry capable of self-government. Thus, the state is requiring of its citizens basic reading, writing and academic skills in order to create productive members of society.

Secondly, the state is seeking to inculcate certain values deemed essential for a harmonious, law abiding citizenry. These two fundamental concepts -- the rights of individuals and the collectivist functions -- often conflict with the interest of individuals, parents, students and teachers, which often conflict with pluralistic concerns of society. For example, the societal concern that students be immunized for the protection of the collective body may conflict with the parents' religious beliefs with respect to immunization.

So in the remaining years of this decade, I think that you can expect to see more conflicts of this type.

The second concept that will dominate education law in the '80s is the movement away from law-related philosophical issues to questions of educational process. For example, in the 1970's I mentioned that we dealt with the basic social concerns, such as the issue regarding segregation, sex equity issues, due process, the rights of handicapped, etc. The case law now appears to be moving more towards housekeeping issues regarding due process, student and teacher dismissal, competency testing, learning requirements, etc.

Now I would like to look briefly into the future at some of the issues which I believe will dominate the remainder of the 1980s.

Personnel management

The first area is personnel management. There will be legal guidelines developed in nearly all areas of personnel mangement. Issues are developing around hiring practices, dismissals, tenure, developments in unionism, etc. Since state law and state board policy and state court decisions govern most employment issues, there are few cases at the national level which have precedence for all of the states. But the trend with respect to employment issues seems to run a parallel course from state to state. West Virginia, for example, in 1979 had the Trimboli case which said that West Virginia's State Board of Education policy providing for an "open and honest evaluation with an opportunity to improve" must be followed with regard to an evaluation of all employees. In this case, Mr. Trimboli was a director of federal programs and he was transferred to a teaching position. He had openly opposed a bond issue in the community, so the court had to balance the right of an employee to exercise his 1st Amendment rights regarding the bond issue as opposed to the right of the employer to loyalty from employees on such important issues. In this case, the court upheld Trimboli's right to free speech.

One might ask whether the result would have been different if Mr. Trimboli had been the superintendent of schools, or suppose he was the public relations officer for the school board. In this case, he happened to be a federal programs director, and the court came down on the side of his 1st Amendment rights. In this

particular court decision, however, the court discussed by way of dicta the state board's policy which says an employee should have an opportunity to improve. The court talked about correctable faults, such as:

- Outside employment affecting one's performance.
- Not knowing the regulations of the board.
- Being late to class.
- Not keeping children in a straight line.

On the other hand, the court pointed out that other faults may not be correctable and that a teacher may be dismissed in the first instance. An example may be:

- Coming to school intoxicated.
- Physical abuse of a child.

In 1977 in Powell v. Brown, the West Virginia Supreme Court said that administrative body must "abide by policies properly established by it." In other words, it said you have to follow your own policies. There's nothing new about that.

Collective bargaining

I think we need to look for a number of explosive concerns related to the increasing unionization of teachers. Since 1959, teacher bargaining legislation has been enacted in 36 states. For purposes of analyzing any trend in this area, it's important to

realize that collective bargaining is divided into several areas: first, the organization of employees; second, the negotiation of a contract; and third, the administration of that contract.

I think it's important to note that there has been no unified approach to the problems of collective bargaining in education. There have been a number of proposals at the national level since 1972 to create some form of a national public employment relations act. Dr. Gordon Gee, the president of West Virginia University and former dean of the law school, has written extensively in this area. He noted recently that the ruling in 1976 in National League of Cities v. Usery may be one of the most important cases of the next decade. In the National League of Cities, the federal Fair Labor Standards Act was challenged as it applies to state employees. The court held that the application of the Fair Labor Standards Act to the states was unconstitutional. It said, "We hold that insofar as the challenged amendments operate to directly displace the state's freedom to structure the integral operations in areas of traditional government functions, they are not within the authority granted by Congress." This case quotes the 10th Amendment, which says in effect, if you remember, that those things which are not in the constitution are left to the respective states and to the people.

Many questions in the area of collective bargaining will revolve around the agency shop. A typical case is the City of

Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission. The question here revolved around whether a school board could prohibit a teacher other than a union representative to speak in an open meeting in which public participation was permitted. In this case, a teacher appeared before the board presenting a point of view which was contrary to the union's viewpoint, and the union protested, saying that the teacher was engaged in collective bargaining. The Supreme Court held that it was contrary to the 1st Amendment rights of the teacher to be excluded from an open board meeting, and that he had a right to make his views known, even though the board was bargaining at the time with the union.

These kinds of issues are going to continually develop, and this, of course, comes under the housekeeping provisions that I discussed earlier.

Religious issues

It appears that we will be dealing with the issue of religious activities in our schools. It looks as though prayer and bible reading in the schools will go through yet another round of judicial interpretation. And there will be continuing interpretation of laws by the courts with respect to tuition tax credits and vouchers and other advantages to private schools.

In West Virginia this year, legislators considered a proposal for a constitutional amendment to permit voluntary prayer in public schools; however, the resolution was not passed. And finally we had a bill passed that allowed for private and parochial schools to be free from all state regulations so long as the students met the 40th percentile on standardized tests. This bill did finally pass and the outcome was that anyone can teach in the private schools; they do not have to be certified; they even do not have to have a degree. As one religious leader told me, "The only criterion I am interested in for my children's teachers is whether or not they were saved by Jesus Christ."

I look for these issues to continue, partially because of the mood of the national leadership and the push from various groups such as the moral majority.

Intelligence testing and ability grouping

It appears that there are crucial questions faced by state and local school districts in implementing performance evaluation policies. How do we develop appropriate tests and then how will the tests be used? In West Virginia, we are one of a number of states instituting a teacher certification test, which must be passed before a teacher can obtain a professional license. Policy 5100 of the West Virginia Board of Education has been established, and the legislature has funded a program that will allow us to develop approximately 30 subject area specialty tests.

Questions begin to center around who is responsible for the test. Who will determine the cut-off score? The same questions revolve around the use of tests by students and whether or not the tests could cause injury to students. For example, should a competency test be used simply to determine the general level of student performance and basic skills on a statewide or district level? Or should it be used to identify the relationships of basic skill areas to areas of strength or weaknesses in an instructional program?

As we begin to use competency tests to make decisions about individual students and teachers, we must accept the fact that there is potential for liability. The same questions come to view regarding competency tests for tracking, grade promotion or denial of a regular high school diploma. A diploma denial, as mandated in Florida and California, probably caused the greatest injury to a student, and here we have a number of legal questions. In a related matter, the NCAA has changed its rules to require that all students must score at least 700 on the ACT in order to be given a scholarship for athletics. I expect a number of court decisions involving this and similar issues.

Since the issues are shifting from equal opportunity to equality in academic performance, I think we also can expect to see more suits regarding educational malpractice. You may have seen the cartoon in one of the educational magazines where the son

comes home with a report card and tells his dad, "When you see this, you'll understand just what a miserable condition that school system is in."

In San Francisco, a literate high school graduate filed a one million dollar educational malpractice suit against the school based on his inadequate education. Although the school had awarded him a high school diploma, he could not read nor write well enough to fill out a standard employment application. The court dismissed the case. This was soon followed by a New York case, in 1978, involving similar facts. A New York City jury awarded $750,000 in damages to a former student and claimed that he had been negligently misclassified and miseducated as a retarded student. A New York appellate division reduced the damages to $500,000, and it, of course, is now being appealed.

We could go on with these and other issues revolving around competency testing, ability grouping and academic performance. Needless to say, these are issues which will be on the forefront in the '80s.

School finance decisions

There will be a number of decisions following the Rodriguez and Serrano cases and now the West Virginia case, Pauley v. Bailey, that was recently decided in favor of the plaintiffs.

This West Virginia financing case has been the most widely publicized case in this nation. I suspect that this is one of the reasons why I was asked to give this presentation.

In 1979, the Supreme Court in the original case, Pauley v. Bailey, declared that children of Lincoln County parents -- and this is one of the poorer counties in our state -- were denied a thorough and efficient system of education as provided for in the West Virginia Constitution. Further, the court said that they were denied equal protection of the laws because education is a fundamental constitutional right in West Virginia. Once the court determined that education is a fundamental right, that shifts the burden of proof and requires a much stronger standard in terms of evidence. The Supreme Court listed elements for the development in every child to his or her capacity of:

- Literacy.
- Ability to add, subtract, multiply, divide numbers.
- Knowledge of government to equip citizens to make and form choices.
- Self-knowledge and knowledge of total environment.
- Work-training and academic training.
- Recreational pursuits.
- Interest in all creative arts.
- Social ethics.

Implicit in these elements are supportive services. The court went on to say that state standards needed to be developed and implemented. All counties in West Virginia must have the ability to attract and employ and retain a high quality staff of sufficient size, to provide a high quality program. Programs must be offered to children of all abilities, and the counties must be able to provide support service in such areas as guidance, health, food and transportation.

The Supreme Court then sent the decision to the trial court -- Judge Arthur Recht -- to determine standards which must be met pursuant to a thorough and efficient system. Judge Recht heard expert testimony for more than two months and then came forth with a lengthy decision requiring standards in all of the curriculum areas, such as math, music, PE, science, vocational education, special education, etc. The Pauley v. Bailey decision required standards in great detail. A few examples will demonstrate:

- Curriculum - Every high school must offer four years of at least two foreign languages. High schools must offer at least four units of general mathematics and five of academic "mathematics."
- Personnel - A pupil/teacher ratio is specified in each subject area. Curriculum supervisors are required for all subject areas.
- Facilities - Appropriate classroom size for each subject is prescribed. All science classes must have access to libraries.

- Equipment and Materials - High school math students must have access to computers. Schools must provide musical instruments to students.

Judge Recht's standards consisted of 244 pages, and the West Virginia Department of Education reviewed those standards. After a cost analysis on the standard-by-standard basis, we determined that full implementation of this decision could cost as much as $1.5 billion. A great deal of political controversy surrounded the decision. On September 1, 1982, Judge Recht amended his order and decided not to appoint a commissioner to oversee the implementation of the decision but instead decided to appoint the State Superintendent and the State Board of Education as the court's commissioner to develop a master plan. He said that the standards in his decision were merely examples of standards that would have to be developed in the master plan and that they were only suggested standards.

Pursuant to the supplemental order, I worked with a committee of 99 people in the development of the master plan. The master plan was presented to Judge Arthur Recht in December of 1982. In January of 1983, he issued the final order. The final order says that the master plan is a commendable document, adopts the comprehensive description of standards for a high quality system of education and is recommended to the legislature and the State Board of Education as an example of a thorough and efficient system as defined in the original case of Pauley v. Bailey.

So now we have the final order; we have the master plan, and we will be working with the legislative leaders, the governor and others to try to begin to implement the plan in the next session of the legislature. It will be very costly, and it came at a time when we are leading the nation in unemployment. It's sad in many ways that such a far reaching decision such as this, which can be a springboard to improved education, came at this time. It can be a singular opportunity for West Virginia to even become the Mayo Clinic of education in the country, and yet it came at a time when we are in the middle of a depression. Other states may be facing a recession, but in West Virginia, where unemployment is over 20 percent, we are in the middle of a depression.

The final chapter has not been written yet, but the Pauley v. Bailey decision is a major decision, and if you've not read it, you should. It goes further than any court has ever gone in the history of this country in defining a thorough and efficient system of education.

Finally, let me say that there are many other areas that could be pursued, but obviously time is not available. But I think it's important that we not fear the courts and just simply react to court decisions. We must take the initiative on certain legal issues, and we must put our own house in order. We must see to it that:

- Appropriate due process procedures are followed when employees are discharged.
- We need to give notice of hearings and conduct due process hearings according to law.
- We must have our attorney review and point out rules of our institutions and state board policies which conflict with constitutional rights.
- We must make sure that rules and regulations and sanctions and due process requirements are known to persons who are affected by our decisions.
- We must simply follow the rules.
- If unexpected situations arise, we must try to consult with our attorneys before we act or react.
- We must try to anticipate problems as much as possible. Ideally, next year's problems should be discussed with our attorneys this year.